FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

Second Appeal No. 275 /2007
(Atmaram Ramnath Katakwal Vs. Nanu Gobra Rathod & anr.)

Appeal	District :
Application No.	of 200
Writ petition	

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders

Mr. S.U. Nemade, Adv. for the appellant.

CORAM : Smt. Vasanti A. Naik, J.
DATED : 11th September, 2007.

Heard Shri Nemade for the appellant.

The appellant is the original plaintiff. A suit was filed by the plaintiff against the defendants for possession of the suit property. It was the case of the plaintiff that the defendant no.1 had encroached upon 14 R of land belonging to the plaintiff on the northern side of the plaintiff's property and the defendant no.2 had encroached upon 16R of land on the southern side of the plaintiff's property. The plaintiff pleaded that he had got his land measured from the T.I.L.R. and it was noticed that the defendants had encroached upon the plaintiff's land. He, therefore, sought possession of the property which was wrongfully in possession of the defendant nos. 1 and 2. The defendants denied the claim of the plaintiff and pleaded that they were occupying their own field properties and they have

not encroached upon 14R of land and 16 R of land belonging to the plaintiff. According to the defendants, the defendant no.1's mother had purchased 5 acres of land by the sale deed dated 11/1/1962. Similarly, the defendant no.2 had purchased 7 acres and 20 gunthas of land in the year 1977. It was denied by the defendants that T.I.L.R. issued notices to the defendants before measuring the suit property and the properties belonging to the plaintiff. The defendants sought for the dismissal of the suit.

The trial Court, on an appreciation of the evidence on record, decreed the suit of the plaintiff by holding that the plaintiff had proved his title to the suit property. The trial Court further held that the defendant nos. 1 and 2 had encroached upon 14 R of land and 16 R of land respectively. The plaintiff was, therefore, entitled to the possession of the suit property.

The defendants challenged the judgment passed by the trial Court in appeal before the District Judge, Darwha. The District Judge, Darwha, by the judgment dated 12th October, 2006, reversed the findings recorded by the trial Court. The first appellate Court held that the plaintiff failed to prove that he was the owner of the land shown to be encroached by the defendants. The appellate Court further held that the plaintiff was not entitled to a

decree for possession as the defendants were occupying their own fields.

Shri Nemade, the learned counsel for the appellant, submitted that the first appellate Court was not justified in reversing the findings recorded by the trial Court by holding that the map was drawn by the T.I.L.R. without issuing prior notices to the defendant nos. 1 and 2 and also because the entire field Survey No. 52 was not measured by the T.I.L.R. to come to a conclusion that the defendant nos. 1 and 2 have encroached upon the plaintiff's land. According to the counsel for the appellant, in case the first appellate Court was of the opinion that the T.I.L.R. had drawn the map without measuring the entire Survey No. 52, the first appellant Court ought to have appointed a Commissioner/T.I.L.R. For measuring the entire Survey No. 52 which included the lands of the plaintiff and the defendant nos. 1 and 2. The counsel for the appellant relied on a judgment reported in **2004(2) Mh.L.J. 722** to substantiate the aforesaid submission. The counsel for the appellant further submitted that though the first appellate Court held that the map was drawn without notice to the defendants and without measuring the entire Survey No. 52, the first appellate Court has not recorded any finding about the correctness of the map drawn by T.I.L.R. and this vitiates the judgment passed by the first

appellate Court. It was then pleaded by the counsel for the appellant that the non-consideration of certain documents produced by the defendants to prove their ownership and possession over the disputed suit property, gives rise to a substantial question of law and for that proposition, he relied on the judgment reported in **1998(1) Civil Law Journal 350**. He lastly canvassed that the first appellate Court wrongly considered that field Survey No. 52 was divided between five brothers and each of the five brothers had sold the properties to third parties, and the plaintiff had purchased only 6 acres of land, without there being any pleadings in the written statement in that regard.

I have perused both the judgments as also the reported judgments which are referred to herein above and relied on by the counsel for the appellant. The trial Court, on the consideration of the material evidence on record came to a conclusion that the plaintiff had proved its case that the defendants had encroached upon 14R and 16R of land belonging to the plaintiff. The first appellate Court being final fact finding Court, was in a position to reappreciate the evidence tendered by the parties on record and after doing so, arrive at a conclusion that the plaintiff had failed to prove his ownership over the disputed land. The first

appellate Court rightly held that the plaintiff had failed to prove that notices were issued to the defendants by the T.I.L.R. before he measured the property of the plaintiff and the T.I.L.R. had not carried the measurement properly by failing to measure the entire Survey No. 52 as the defendant nos. 1 and 2 are also the owners of the other part of Survey No. 52. It is conspicuous to note that no title deed has been produced by the plaintiff on record to show the extent of land owned by the plaintiff. The measurement map drawn by T.I.L.R. was accepted by the trial Court, but no fault can be found with the reasons recorded by the trial Court for discarding the map drawn by the T.I.L.R. The first appellate Court has, for cogent reason, held that T.I.L.R. had failed to serve the notices on the defendants before carrying out the measurement and it was also apparent from the record that the T.I.L.R. did not measure the entire Survey No. 52 though all the three parties were in possession of Survey No. 52, which was earlier divided into five parts. Since the plaintiff had failed to prove his case, there was no reason for the first appellate Court to have scanned the document of title filed by the defendants. Specially for a case of encroachment, it is necessary for the appellant/plaintiff to produce cogent and reliable evidence to show that the defendants have

encroached upon the plaintiff's land and also to prove the extent of encroachment by specifically pleading the extent of the land owned and possessed by the plaintiff.

In this case, the T.I.L.R. had not measured the property belonging to the plaintiff as well as the defendants together. Similarly, the plaintiff had also not filed any document of title to prove the extent of the land owned by him. In such circumstances, there was no alternative for the first appellate Court but to have reversed the decree passed by the trial Court and dismiss the suit filed by the plaintiff. There was no reason for the first appellate Court to discard the evidence of the defendants about the land Survey No. 52 being divided into five parts as it was not a suit for partition between the parties, but the defendants, by tendering evidence, were merely trying to point out that the Survey no. 52 which was, initially, owned by one Gyanba, was shared by five brothers and these five brothers sold the lands to various persons which included the plaintiff and the defendants. The judgment reported in **2004(2) Mh.L.J. 722** would also not be of any assistance to the case of the appellant.

The findings recorded by the first appellate Court are pure findings of facts based on a just and proper appreciation of the material evidence on

record. No fault could be found with the findings recorded by the first appellate Court so as to entertain this second appeal.

Since no substantial question of law arise for consideration in this second appeal, same is dismissed with no order as to costs.

JUDGE

RMP